

[3] Mrs Kirkley has raised personal grievances alleging her dismissal was unjustified and that Ora Limited failed to provide a safe workplace. She seeks compensation for the consequences of her dismissal and damages for workplace stress.

[4] These claims are denied by Ora Limited.

Background

[5] Ora Limited offers the Kiwi Ora distance-learning programme providing new migrants with knowledge and skills to assist their successful settlement in New Zealand. Ora Limited is funded by the Tertiary Education Commission (TEC) through Te Wananga o Aotearoa (Wananga).

[6] Ora Limited is owned by Susan Cullen. A board of directors is responsible for the direction and governance of the organisation. A management team is responsible for the day to day running of the business. Ora Limited is one of a group of companies owned by Mrs Cullen.

[7] Mrs Kirkley was employed by Ora Limited at the commencement of the business in November 2002 as an internal administrator. In 2005 she was promoted to the role of administration manager responsible for the administration of finance, information technology and human resources.

[8] Mrs Kirkley reported to the managing director and was part of the senior management team. Her salary, including bonus, was just over \$90,000 per annum. A car was included in her remuneration package. Mrs Kirkley attended work between the hours of 9am and 3pm, allowing her to pick and drop off her children at school. The corollary of this arrangement was that Mrs Kirkley completed work at home, as necessary. This arrangement did not alter during her employment. Mrs Kirkley's concern is that it was necessary to work so many hours at home that it impacted unduly on her family life.

[9] From July to November 2005 the continued funding of Kiwi Ora was uncertain. This issue was resolved on an interim basis and the business moved into a

new phase. In later 2005/early 2006 significant changes occurred in the business; a new CEO was appointed (an internal appointee Wayne Wild), two senior staff members (including the new CEO) left the organisation, Mrs Kirkley was promoted to the position Head of Corporate Services and Mr and Mrs Cullen took over the day-to-day management of the business.

[10] The breaches of contract asserted by Mrs Kirkley allegedly occurred from October 2005 until she was suspended from her employment in late February 2006. She says that from October 2005 she was over-worked and under resourced, that she drew these concerns to her employer's attention repeatedly and that it failed to take reasonable steps to support her. She says these breaches were compounded when Mrs and Mr Cullen took over the day-to-day management of the business; she was unable to take scheduled annual leave in January 2006, she was not supported in her new role, Mrs Cullen shouted at her and threatened her with dismissal and communication within the business was poor, causing her to feel she had no control over her work. Mrs Kirkley says these breaches of contract caused the collapse in her health she suffered ongoing depression and anxiety.

[11] The alleged breaches culminated in the events leading up to and including Mrs Kirkley's dismissal in April 2006. Disciplinary action was commenced against Mrs Kirkley following her attendance at work on 27 February 2006 when she "*lost it*"¹. She was suspended from her employment by letter dated 28 February 2006 (which was later transferred to sick leave) and a disciplinary investigation ensued culminating in her dismissal in April 2006.

[12] Mrs Kirkley attended her GP on 28 February 2006 suffering from work-related stress.

[13] On 7 March 2006 Mrs Kirkley was referred by Mr Ponniah to Dr Francis Pitsilis for an assessment. Dr Pitsilis is a GP with a particular interest in stress and related illnesses. In her report to Mr Ponniah Dr Pitsilis diagnoses of Mrs Kirkley were:

1. she has anxiety with lowered mood and fits the diagnosis of major clinical depression
2. she also has irritable bowel syndrome as evidenced by nausea and diarrhoea

¹ Refer GP notes [81] below.

3. Headaches.
4. Skin rash, scalp – since December 05

[14] Mrs Kirkley was referred to a clinical psychologist, Kay Mathewson, with whom she met twice in July 2006. Mrs Kirkley was distressed and Ms Mathewson understood this to relate to her sense of having been unfairly treated with regard to her workplace situation.

[15] At date of hearing Mrs Kirkley continued to receive treatment from Dr Pitsilis. It is Dr Pitsilis' opinion that Mrs Kirkley is not yet ready to return to employment.

Principles and issues

(i) Workplace stress

[16] In considering a claim for workplace stress the test to apply is that set out by the Court of Appeal in *Attorney-General v Gilbert* [2002] 1 ERNZ 31, 49:

The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is reasonably practicable requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing a breach of the contractual obligations. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgement on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[17] Mr Brant and Ms Toy-Cronnin helpfully summarised the key elements for a claim for workplace stress. Mr Ponniah accepted them, as do I. In making such a claim an employee must show:

- The stress suffered is work-related ie, caused by a breach of the employer's duty;
- The stress has caused a medically recognisable condition (stress and anxiety are not enough);

- The employer must have known or ought reasonably to have known about the stress; and
- The employer has failed to take all practical steps to deal with the stress.

(ii) Unjustifiable dismissal

[18] Whether Mrs Kirkley's dismissal was justifiable must be judged in accordance with s103A of the Employment Relations Act 2000:

103A Test for justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[19] The approach to the application of section 103A is articulated by Shaw J in *Air New Zealand v Hudson* [2006] 1 ERNZ 415. The role of the Authority, in assessing the justifiability of an employer's actions, is not to substitute its own view but to determine what a fair and reasonable employer would have done in all the circumstances and to evaluate the employer's actions by that objective standard.

[20] To apply these principles to this factual context I must consider first, whether, on the information available to Mr Cullen at the time, a fair and reasonable employer would have dismissed Mrs Kirkley. And second was the disciplinary inquiry sufficient to support the conclusions reached.

Issue 1: Workplace stress

(i) October – December 2005

[21] In July 2005 the Minister of Education announced that non-Maori enrolees of the Wananga would not be funded by the TEC. Mrs Cullen wrote to the management team on 18 July 2005 advising that all enrolments in the Kiwi Ora programme were to cease after December 2005, that the business would not be financially viable unless a joint venture with another tertiary provider could be entered or the Wananga won its

legal challenge to the review of TEC funding. The email went on to set out the immediate steps to be taken by the management team to deal with the uncertainty created by this announcement and directed that an overnight retreat be organised for staff to plan the future of Ora Limited. The email advised that all new appointments were frozen, that all communication was to be with Mrs Cullen as the managing director had moved into another role.

[22] In November 2005 a two year reprieve for the withdrawal of funding had been successfully negotiated. Mrs Kirkley said in evidence that this advice alleviated her immediate concerns but that she was still apprehensive as to the security of her employment. Mrs Cullen said in her evidence that the jobs at Ora Limited were not secure and that the two year reprieve would allow a managed redundancy process. She said this was made clear to staff and communication about the issues was open and full. I accept this was the case.

[23] This was, understandably, a period of uncertainty for the staff of Ora Limited. The organisation was on notice that its funding source was to be phased out and another funder would have to be found.

[24] Aside from the personal and workplace anxiety this uncertainty created there were practical implications for Mrs Kirkley. She had a new manager to report to as the managing director role had been replaced by a CEO, Mr Wild. She said her work load increased by 30% as Mr Wild passed more and more work onto her. Mrs Kirkley said her job was busy enough without these additional duties. Compounding this pressure was the nature of the work, which was deadline driven. Mrs Kirkley described the pressure as “always on”.

[25] By November 2005 Mrs Kirkley said she was beginning to feel the effects of overwork. She said she felt tired, was having difficulty sleeping and woke thinking of work. She said she raised these concerns with Mr Wild and he agreed to employ a part-time assistant to help Mrs Kirkley but that no back up was provided.

[26] Mrs Kirkley said she did not know if her concerns about over work, or request for assistance were passed on to Mrs Cullen. She said she barely knew Mrs Cullen and had had little contact with her over the years of her employment at Ora Limited.

[27] In early November 2005 Ora Limited changed banks. This required Mrs Kirkley to implement the transfer. She raised some concerns with Jacqui Donaghy, the administrator of another company owned by Mrs Cullen, Awarua Limited. Mrs Kirkley said she told Ms Donaghy that she was having difficulty coping with the workload, the complications of a recently mandated bank change and associated technological challenges. Ms Donaghy denied this. She said Mrs Kirkley said she was unhappy about the bank change and complained about the extra work this task created.

[28] Ms Donaghy advised Mrs Cullen of this discussion. In response Mrs Cullen emailed Mrs Kirkley on 3 November 2005:

Kia Ora Sonja

I was just talking to Jacqui and she relayed to me your discontent in shifting from ASB to BNZ. Politically ASB will not lend any overdraft feature to us because of their belief about the business stability. I spent the mid part of this year preparing documentation as well as external consultants and went through a huge process with ASB to come to this conclusion.

We must have an overdraft facility in place to protect the company and the whole set of companies. It is not just Ora that has to shift, it is all the companies and the reason we are going to BNZ is because they are the banking institution the Wananga banks with and they understand the business we are in.

I respect your concerns, but at this level of decision making, I need to ensure your loyalty and trust that the decision I make for the business are the best for everyone concerned. I need the hard work put in and I need it done with little fuss. It is an important time of regeneration and we must get our ship through the next period as smoothly as possible.

Concerns about strategy must be directed to Wayne, so that he could have informed you about the WHY. If we all have a 'why' then everything else falls smoothly into place.

*Thank you for all your work
Susan*

[29] Mrs Kirkley replied that same day:

Dear Su

I apologise for causing you to have to write this email when you are busy enough already with all the other things. A meeting is scheduled for tomorrow morning with Denver from the BNZ to work through the best possible way for Ora to make the change as soon as possible without any problems. We will have to get creative and make it work for us.

Please be assured of my trust and loyalty in you and the Wananga and the ship will sail smoothly through the rough waters.

Regards

Sonja

[30] Mrs Cullen replied the following day:

Thank you so much that's so lovely I appreciate your support and effort and I know that the change means more work for you than anyone else. I could have explained to you why we are doing it myself, that way you would have the background. So I am sorry about that, it has been the hardest year ever!!! But now things are better and we will have stability for once!! And the bank will loan us if we need it, that part of having no facility all year was scary! Sx

Determination: Workplace stress October – December 2005

[31] In her oral evidence to the Authority Mrs Kirkley said she believed the following factors caused the stress symptoms she experienced during this period; poor sleep, irritability and nausea:

- Mrs Kirkley was worried about the future of the jobs at Ora and because of her position within the organisation she could not display her concerns.
- The bank change was not a simple process;
- Advice that the business may close in December;
- That she had a lot of work on her plate;

[32] I do not accept that any of these factors amount to a breach of duty.

[33] Mrs Kirkley accepted that her concerns around job security and the future of the organisation were outside the control of Ora Limited. I am satisfied on the evidence received that Ora Limited took reasonable steps to support staff, including Mrs Kirkley at this difficult time; Mrs Cullen was open about the difficulties facing the organisation and updated staff as necessary, that active steps were taken to secure the future of the organisation and by December 2005 this was achieved, at least on an interim basis and an off-site overnight retreat was held with staff, including Mrs Kirkley, to discuss strategies to deal with the crisis.

[34] Mrs Kirkley said in her evidence that Mr Wild accepted she could only do what she could do in relation to the bank change. Ms Donaghy, the administrator for the Cullen's group of companies was available to Mrs Kirkley. The 3 November 2005 email exchange between Mrs Cullen and Mrs Kirkley does not support her claim the issues around the banking change amounted to a breach of duty. Mrs Cullen explains the reason for the change and acknowledges the extra work created for Mrs

Kirkley. Mrs Kirkley's response does not raise any issues about workplace stress and does not ask for more support. The email gives Mrs Cullen an unequivocal assurance that the bank change will happen as quickly as possible. It was reasonable for Mrs Cullen to accept these assurances.

[35] There is no documentary evidence regarding Mrs Kirkley's work during this period which would support her claim of work-place stress. Mrs Kirkley took no sick leave during this period. Mrs Kirkley did not keep a record of the hours she worked. She did not write to Mr Wild or Mrs Cullen raising concerns about her work load.

[36] Mrs Kirkley's claim that her workload increased by 30% remained unspecified. Mrs Kirkley had asserted that Mr Wild passed the preparation of Board reports to her. It became clear during the course of the investigation that Mrs Kirkley was not responsible for the analysis of data required to produce reports for the Board. The end of year payroll was a task Mrs Kirkley had undertaken and completed throughout her employment. It is clear that it was agreed Mrs Kirkley needed payroll support and steps were put in place to make that happen. The weekly management team meeting minutes for October/November 2005 do not record any issues raised by Mrs Kirkley about her work load. The minutes for the 28 November 2005 meeting record that the management team agreed to provide Mrs Kirkley with support by training an existing employee in MYOB. This did not happen before the end of 2005 and was overtaken by the 2006 restructuring (discussed in more detail below) is an unfortunate consequence of the upheaval facing the organisation. This occurred after Mr Wild's decision not to allow Mrs Kirkley access to MYOB at home. It is fair to assume that this arrangement was satisfactory, at least in the interim, because there is no evidence Mrs Kirkley took the issue further. For example, she did not request contract payroll assistance, as occurred in early 2006.

[37] There was no evidence that Mrs Kirkley was suffering from a diagnosable illness during this period. Mrs Kirkley did not visit her doctor regarding the sleeplessness, nausea or stress she was experiencing at this time. As I understand the diagnosis, Dr Pitsilis says Mrs Kirkley was exhibiting the symptoms of a major depressive episode from 27 February 2006 on. The diagnosis is not retrospective for the period in question.

[38] Mrs Kirkley has not made out her claim for workplace stress for the period October to December 2005.

(ii) January – February 2006

(a) restructuring

[39] On her return from the two week Christmas shut down Mrs Kirkley raised concerns with Mr Lacey about Mr Wild's telephone records. She processed these records as part of her administration role. The telephone records showed that Mr Wild was in frequent contact with the former managing director of Ora Limited, who had left in October 2005 to set up a competitor business. Mr Lacey wrote to Mrs Cullen with these concerns.

[40] Mrs Cullen telephoned Mrs Kirkley on 11 January 2006 to discuss the issues raised in Mr Lacey's letter. Mrs Kirkley says the discussion lasted three hours. Mrs Cullen says no more than one hour. Mrs Kirkley says she poured her heart out to Mrs Cullen about her work load, that she was carrying work for Mr Wild, had asked for help and received none.

[41] Mrs Cullen's recollection of the discussion is quite different. She says after Mrs Kirkley answered her questions about Mr Wild's telephone records she then said she was the only one who did any work and made a case that she should be given more managerial responsibility. Mrs Cullen said she asked for examples of Mrs Kirkley being passed on Mr Wild's work and that what she was talking about was the processing of raw data into MYOB for Mr Wild to then analyse to prepare reports to the Board. At the investigation meeting Mrs Kirkley accepted that the preparation of Board reports was not something she had been involved with.

[42] The following day, 12 January 2006, Mr and Mrs Cullen arrived at the Ora Limited offices to meet with Mr Wild. Mrs Cullen said in her evidence that he was unable to satisfactorily answer her questions as to his ongoing contact with a competitor and that this was a situation that she could not afford to have. She offered him three months wages and a favourable reference if he left that day. The offer was accepted.

[43] On 13 January 2006 Mrs and Mr Cullen met with Mrs Kirkley and Mr Lacey. Mrs Cullen advised them that she would take over the senior education role and Mr Cullen would take over the CEO role. Mrs Kirkley was offered the role of Head of Corporate Services which she accepted. She was to continue with her current duties pending the outcome of reviews of the HR function and strategic review of staffing needs which Mrs Cullen said would be carried out shortly. Mrs Kirkley's salary was confirmed and her bonus rolled into her salary.

[44] In her oral evidence Mrs Kirkley said that after her appointment to the new position she continued with her human resources and finance roles and that she filtered administration issues for Mr and Mrs Cullen. Mrs Kirkley said she was not involved in the preparation of finance reports and that Mr and Mrs Cullen prepared all Board reports.

[45] Also on 13 January 2006 Mrs Kirkley advised Mr Cullen that she had three weeks annual leave booked to begin the following week but she would postpone it given the changes in the business. Mrs Kirkley told me Mr and Mrs Cullen told her she should take her leave and that they would cope without her. She said she would take three days leave in the following week, which she did.

[46] I asked Mrs Kirkley why she had cancelled her leave. She said that no one would have been there to assist Mr Cullen, that she was worried that she would not have a job given what had happened to Mr Wild and the Head of Education, Barend de Klerk, whose position had been made redundant whilst on annual leave, with Mrs Cullen taking over those responsibilities. Mrs Cullen also said she really believed in Ora Limited and felt obliged to stay. Mrs Kirkley did not discuss these concerns with Mr and Mrs Cullen. Mr Cullen said that, though he was impressed with Mrs Kirkley's commitment to the business when she cancelled her leave, he had encouraged her to take the leave.

[47] Mrs Kirkley's appointment was formally announced in a newsletter to staff on 15 January 2006:

...
3. Sonja has been formally appointed as the new **Head of Corporate Services**, in which she will assume responsibilities for managing Finance, HR, Administration and Operations. We

will then move to re-establish and review new roles in these areas so there will be new opportunities coming up.

[48] Her appointment was celebrated with a staff morning tea and presentation of flowers by Mrs Cullen.

[49] On 16 January 2006 Mrs Kirkley received an email from a PA² (programme advisor) congratulating her on her appointment to the new role. Mrs Kirkley replied on 17 January 2006:

Dear Vimmi

Sorry to get back to you only today. It has been unbelievably busy here.

I would like to thank you for your beautiful words and best wishes. I can see they come from your heart. My new role will be [sic] challenge, but with a super supportive team, who can fail?

Wait till Su gets to you guys. She is just amazing and her enthusiasm just rubs off and one just can't help being motivated. All this change will be great. There are super things going to happen and everything will be open and discussed.

Best wishes

(b) implementing the restructuring

[50] From 12 January 2006 Mr and Mrs Cullen took over direct management of Ora Limited. They spent several days per week in the Auckland office of Ora Limited reviewing and managing the business. They were constantly in touch with the office when attending to other business interests. When they were in Auckland Mrs Kirkley attended daily meetings with Mr and Mrs Cullen and assisted their familiarisation with the day-to-day workings of the business.

[51] In mid-January 2006 Ora Ltd's accountants were commissioned to conduct an audit of the company's finances given the circumstances of the exit of Mr Wild from the organisation. Mrs Kirkley was required to assist the accountants in their audit facilitating their access to documents. In early February 2006 Mrs and Mr Cullen discussed with Mrs Kirkley the conclusions of that audit and Mr Cullen's review of the Mr Wild's emails.

² "Programme Advisor", position responsible for delivering the Kiwi Ora programme.

[52] The following email exchange ran between Mr Cullen and Mrs Kirkley on 2 February 2006:

Hi Sonja

Hope you are having a good day and you are managing to get on with your work, without me there to distract you!!

I received these by email from Michael Roberts this morning and thought I would forward them to you for your information. It is basically the plan for the investigation and an acceptance letter. You could forward to Nigel too if you like ... I don't have his email address. I am happy with the terms of reference and the scope of the investigation and I think that this will put these possible dishonesty issues behind us and set our minds at rest.

Have a great weekend ... thank you for your wonderful loyalty to Ora and all your hard work!! We both really appreciate you and all you are doing ... you are doing a great job.

Thanks - Brett

Hi Brett

Thanks for the above. Will work my way through them. We have had an eventful day with sorting out some of the internal workflow problems. We had a wonderful meeting and lots of exciting things came out. I think everybody is on board and wanting to run with the changes. I will keep you informed at all times. Just need a bit of time to catch up with all the everyday things.

Hope the two of you will get a bit of rest as well over the week-end, but knowing Su she will probably not rest until everything is done. She has this amazing energy – needs to share her secret with us. Thank you for taking on the role of mentor and being there when needed. I really appreciate this.

Regards

[53] Mr Cullen replied:

Sonja

Great to hear you had a good meet.

Yes my wife is full on that's for real!!!! I's [sic] just because she's very passionate about what she does and that tends to roll out to those around her.

I am really enjoying being more part of the team up at ora and getting to know everyone. You know it all anyway!!! But I know that during times of change that it's always great to have someone else to chat to about stuff so I'm more than happy to help as much as I can.

Thanks - Brett

[54] On 3 February 2006 Mrs Cullen emailed Mrs Kirkley and Mr Lacey:

I just wanted to say that it has been the most exciting part three weeks of my life and getting to know you two and going through what we have lately just restores all my faith in good people being dedicated to a great purpose. You are both so special and I am so grateful that you saved the day by helping me understand what was going on. Again I am sorry I didn't know or support you better in the past, it is a great learning curve for me. Thank you too to your spouses for helping support you through this difficult time as well.

*It took great courage to make the changes that we all have. I am just so grateful. Thanks
S*

[55] Mrs Kirkley responded on 5 February:

Hi Su

I am glad you did what you did at the time you did it. Another week or two, it might have been to late for me. My heart in Kiwi Ora and all its special people. Just the thought of having to leave them behind was a very difficult one. But now we can look forward, create, develop, implement and run into a great future. I know we will always have a bit of a bumpy road, but nothing we haven't mastered in the past – a bit of spice will keep us on the ball.

Thank you for putting your trust into Nigel and me. I just hope I can stand up to your expectations and the Kiwi Ora's people. I will certainly give it all I have. Should I go off the track, please let me know immediately, before it is too late. I am so happy to learn from you and Brett and implement and motivate whatever I have learnt.

Hopefully you are having a bit of a rest this week-end. I think next week it will be full on again.

...

[56] A HR review was commissioned and conducted in February 2006 by Lee Astridge, a human resources consultant. Her brief was to assess the risks in the area of human resources and help Mrs Kirkley. Mr and Mrs Cullen had told Ms Astridge that Mrs Kirkley was very busy and the recent changes in the management structure meant she needed some help.

[57] On 6 February 2006 Ms Astridge attended the offices of Ora Limited, met with Mrs Kirkley for about two hours and reviewed the human resource processes. Ms Astridge was concerned at the workplace practise whereby everyone left between 3pm and 3.30-pm. She thought this may be contributing to Mrs Kirkley's busyness and could be looked at. In her report dated 17 February 2006 Ms Astridge wrote:

Employee Relations are managed on an ad-hoc basis with the first line of support being the Administration Manage [Mrs Kirkley]. She reports that a lot of her work time is being used by staff wanting to talk about personal as well as work related issues. This has the result of making her time less productive. From a professional point of view this can also blur the lines of responsibility and authority with regards to her role in the business.

[58] Mrs Kirkley said she welcomed any help from Ms Astridge but heard nothing from her after 6 February 2006. She said there was nothing Ms Astridge could do to immediately alleviate her workload. She did not receive a copy of Ms Astridge's report during her employment.

[59] In mid-February 2006 Mrs Cullen authorised the contracting of payroll services. A payroll clerk was brought to help with running the payroll. Mrs Kirkley said this relieved a little of her workload.

[60] At about this time all Ora Limited staff, including Mrs Kirkley, attended a visit to Mrs Cullen's home Marae. Part of the visit included a Union organiser addressing the staff about work place rights and union membership. Staff were also referred to EAP counselling. Ora Limited recognised this was a time of change for staff, that change is often difficult and that staff may need support external to the organisation. These initiatives would have had a positive impact on Mrs Kirkley's human resources role.

[61] Mrs Kirkley said the Marae visit was a "*fabulous experience*". She did not raise any workplace issues with the Union organiser then or later. Mrs Kirkley did not avail herself of the offer of EAP counselling. She said in evidence that she did not know about EAP. I find that surprising given her human resources role.

(c) Mrs Kirkley's work-place stress

[62] By mid-February Mr and Mrs Cullen began to recognise the changes and workload were having a negative impact on Mrs Kirkley. In response to an email request from Mrs Kirkley for help with a spreadsheet, Mr Cullen concluded in an email dated 12 February 2006:

...
Once again, thank you for all your hard work and commitment. Please pass our thanks on to Bill and your children, as they too are having to make sacrifices for you to be working on the business.

I am looking forward to spending some time with you without the interruption of short weeks and the audit processes that are being carried out. You are working extremely hard at present with little time to think and make good decisions so I want to focus on managing the quality of your work life.

See you Friday ...have a great week.

[63] On 17 February 2006 Mrs Kirkley was advised by email by a Christchurch based PA that Mrs Cullen had approved a mail box address to enable students to post correspondence directly to them. Mrs Kirkley had some serious reservations about the mailbox. That same day she emailed Mrs Cullen:

Re: Christchurch's PO Box

Hi Su

Just to give you some background – this has been asked for a number of times and it has been discussed fully between Pas and previous Mgt team and the decision was not to go ahead with it for the following reasons:

- 1. Invoices and/or important documents could be sent there and be delayed or lost.*
- 2. Assessment books could get lost and/or delayed, which could cause chaos in the system.*
- 3. The reason for wanting the box is to receive follow-up from student, but these follow-ups should come back to Oriol to be logged and are never returned to Pas. Without this system we will be vulnerable.*
- 4. This will create more tracing work at Home Base for lost assessments and mail.*
- 5. Next thing is that other Pas will also be asking for boxes.*

All mail normally is delivered to Home Base and distributed. Please may I ask you to consider the above.

[64] Mrs Cullen replied the following day:

Thanks Sonja

Logically I can see your concerns for admin, however safety for correspondence between PAs and students for promotion and support session planning is also very important. I believe there are solutions for addressing your concerns and the PA concerns. I have already signed off the post box unaware of the history, because it seemed commonsense to me, I won't be taking the decision away because it's already done. If other Pas want to do it too, then I will grant them as well.

I look forward to you building solutions and positive ways to ensure successful use of the mail systems to the benefit of everyone concerned, its part of the changes in thinking and development that give us challenges and helps us shift possibilities!

Well done!

Sx

PS...on an order of priority...this is how I want admin to "think"...Students first, Pas next, Admin next, managers next, Su last. Top priority...student safety, PA safety...etc. If admin reframe their thinking into these priorities...the system will work beautifully.

It will take a bit of time but once I demonstrate to you this way of working it will make everything flow wonderfully well, and bring greater creativity to solutions.

[65] On 20 February 2006 Mr and Mrs Cullen were in Auckland. They had a breakfast meeting at a Milford café with Mr Lacey. The Christchurch mailbox and Mrs Kirkley's response was discussed. Mr Lacey said Mrs Cullen described it as the final straw. Mrs Cullen was referring to an issue in the preceding week. Mrs Kirkley had written job descriptions for and advertised two new finance and human resources administrator positions and appointed an internal candidate to one of the positions. Mrs Cullen said these actions were unauthorised and contrary to her instructions and that she had to act quickly to undo them. Mrs Kirkley said she these actions were authorised and Mrs Cullen took the steps she did because she had changed her mind.

[66] At the café meeting Mr Lacey told Mr and Mrs Cullen that Mrs Kirkley had told him she was unhappy about the Christchurch mailbox and had made a number of personal comments about Mrs Cullen's decision and about her generally.

[67] At a meeting later that day Mrs Cullen confronted Mrs Kirkley with what Mr Lacey had told her that morning and told her she considered her behaviour was unprofessional. Mrs Cullen told Mrs Kirkley that she had to adjust her attitude or they would be heading for disciplinary problems. She said she left the meeting to go to another and the discussion continued with Mrs Kirkley and Mr Cullen.

[68] Mrs Kirkley says Mrs Cullen lost her temper in the meeting and told her she had to start thinking her way or she would be dismissed. Mrs Kirkley says she told Mrs Cullen that she was tired, that she did not know where her job started or finished and that she needed some help.

[69] On 21 February 2006 Mrs Kirkley meet with Mrs and Mr Cullen and Mr Lacey. Mrs Cullen proposed a six month training sabbatical for, as Mrs Cullen put it in her witness statement, Mrs Kirkley to "*open her mind to new and more effective management methods than those she had become used to under [the previous general manager]...[and] get to know the PAs [programme advisors], and their work, a lot better.*" No detail of the sabbatical was provided at this meeting as none had been worked out.

[70] Mrs Kirkley immediately accepted the offer. The meeting was tearful and emotional.

[71] Mr Lacey was at the meeting. In his evidence to the Authority he said Mr and Mrs Cullen had discussed the sabbatical idea with him immediately before the meeting with Mrs Kirkley. He recalled them being very concerned about Mrs Kirkley, that her behaviour was "stressed out" and that she needed some training to fulfil the new role.

[72] Mrs Cullen sent an email to all staff the following day, 22 February 2006, announcing Mrs Kirkley's sabbatical:

Dear All

Please can I inform you all that Sonja has taken study leave for the next six months for professional training in management and in the meantime all correspondence about finance or assets to her, needs to be redirected to Gail, and any HR, salary, staff payment issues redirected to Denise, and any training, advice, support needed redirected to Nigel, and any worries directed to us and we will do the needful.

*Thankyou.
Susan and Brett*

[73] Mrs Kirkley spent the next few days, including the weekend, attending the office informally, researching training options and sitting in on a Kiwi Ora student session. Mrs Kirkley was in email and telephone contact with Mrs Cullen. On Friday 24 February 2006 Mrs Kirkley emailed Mrs Cullen:

Hi Su

How are you doing? Nigel tells me that you and Brett are not well. Hope it is nothing too serious. I think a few days off for you and Brett would probably not be a bad idea. Our bodies can only take so much and then they are shouting...

I had a great day today. Went to the office at lunch time and shared some cake with the crew and had a look at the furniture upstairs – beautiful.

*...
Also got in touch with Landmark. The next course is:*

...

The next one is only in May. I think I will be up to it by the 24 March? What do you think? Should I go ahead?

Have you ever done the Anthony Robbins course? What do you think of him?

Wishing you a speedy recovery and look after yourselves.

Thanks – Sonja

[74] Mrs Cullen replied:

Yes 24th of March would be great.

*...
There is a full Auckland staff meeting on Monday at 11am, to discuss the team changes you are welcome to come if you like to keep in touch, but you don't have to. Might be a chance to talk to everyone about your development sabbatical perhaps? Over to you as well.*

*...
I'll be working on books to send you and ideas for training...
BUT HAVE A BREAK TOO.*

*...
Sx*

[75] On Sunday, 26 February 2006 Mr Cullen emailed Mrs Kirkley:

Hi Sonja

How are you?

Susan was telling me that you are going to go into Ora on Monday for the team leader meeting. Jaqui will be there as well to look at the idea of transferring core administrative function to Arawa. Jaqui may have some questions for you so if you could help her while she is there that would be great. Also, the February data for MYOB needs to be inputed...I would be most grateful if you could do this for us. Hopefully, we will have our systems sorted by the end of March and everything will be handled from there on.

I am planning to be at Ora by about 1 tomorrow so I will look forward to seeing you then.

Thanks - Brett

[76] Mrs Kirkley responded:

Hi Brett

No problem in doing whatever needs to be done. I will make arrangements with the crew in the office to collect all invoices and will come in to code them and enter them into the system. See you on Monday.

Regards, Sonja

[77] Mrs Kirkley attended work on Monday, 27 February 2006, as requested by Mr Cullen. Her plan was to attend the PA meeting at 11am, check the contracted payroll clerk was on track to run the payroll that day (Mrs Kirkley had prepared the payroll and instructions the preceding Friday) and answer any questions Ms Donaghy may have.

[78] Before the 11am meeting was over Mrs Kirkley was called out to assist the payroll clerk. She found her prepared payroll instructions had been dismantled and went to her office to search for the missing documents. She then discovered that her personal belongings had been boxed up. Mrs Kirkley experienced a very strong reaction and in her words “*went out of control*”. The boxing up of her personal belongings had not been discussed with her and she thought that she must be the subject of an investigation as had been Mr Wild. In a raised voice she moved through the Ora offices saying that she felt “*violated and raped*”. She confronted Mr Cullen with this statement and demanded to know what right he had to box up her personal effects. He explained that he had directed that her belongings be packed up and apologised as did Mrs Cullen. Mrs Kirkley continued to express her concerns through the office.

[79] Mrs Kirkley eventually managed to regain control of herself and set about to sort out the payroll data. It was at this point that she decided to give her viewing codes to the contracted payroll clerk. She discussed this decision with Ms Donaghy. This issue is discussed in more detail below.

Determination: Workplace stress January – February 2006

[80] Mrs Kirkley says that during this period of employment with Ora Limited she was overworked and unsupported and this has resulted in a period of significant ill health. She told me that Ora Limited could have managed things differently and better, in relation to her employment, by planning more, being less spontaneous in its decision-making and making more use of outside consultants. In relation to her workload, Mrs Kirkley said it could have been better managed if the human resource and finance assistant roles had been implemented more quickly and if she had had a job description when first appointed to the Head of Corporate Services position, she would then have known where her position began and ended.

[81] There is no doubt that by late February 2006 Mrs Kirkley was suffering from workplace stress. The events of 27 February 2006 graphically demonstrate this. Mrs Kirkley first visited a doctor about her work situation on 28 January 2006 after receiving the suspension notice. The notes of that visit record:

28-Feb-2008 *suffering from work-place stress. She has not been sleeping since 12/1/2006 and has been stressed and overworked. She "lost-it" yesterday despite not shouting or screaming. Today she received a letter of suspension. She was suffering from "burn out" at the end of last year associated with the stress within the organisation. Weepy and anxious. Pulse 80.*

...

Dx: *Acute reaction to stress*

[82] Dr Pitsilis' diagnosis is that from 27 February 2006 Mrs Kirkley was experiencing major clinical depression. Following is the summary page of Dr Pitsilis' report to Mr Ponniah dated 7 March 2006:

I ASKED HER [Mrs Kirkley] IF SHE HAD ANY PAST HISTORY OF FEELING THIS WAY;
She has had no history of depression or anxiety

DIAGNOSIS:

1. *She has anxiety with lowered mood and fits the diagnosis of major clinical depression.*
2. *She also has irritable bowel syndrome as evidenced by nausea and diarrhoea.*

3. *Headaches.*
4. *Skin rash, scalp – since December 05*

CAUSES OF MRS KIRKLEY'S CONDITIONS;

I find that the cause of her symptoms were wholly contributed to by her work: -

- *She was already in a **demanding, time pressured, deadline driven job with no holiday relief.***
- *Then was added was [sic] 30% of the acting CEO's work – **overload** – she became run down, and was not functioning well at this time.*
- *There was **poor work/life balance** – no time for family, hobbies, exercise, eating properly.*
- *Work demands even caused **poor self care** – no time to exercise, eat properly, sleep enough, take a holiday.*
- *She was **poorly managed** – **no new job description, support, training or guidelines***
- *Shouted at and threatened with job termination – **Harassment***
- ***Poor communication**, and not being informed caused **lack of control***
- *Others have had problems in this workplace – Kitty from marketing*
- ***Poor management ethics** over indulging confidential personal information*

She has not been functioning well since December 05. Her workload then increased further, with more deadlines, and organizing added to her already present deadlines.

She forwent a badly needed holiday (to help her recover), and worked 12-16 hour days. Then, when she took over the CEO's role on top of her own, and her husband returned to work, she was working 5am – 3pm and depriving herself of sleep.

When she was interacting with Mr and Mrs Cullen around 27th February, she was significantly unwell, not functioning properly, and suffering from the diagnosis I have already made.

There is no evidence that she contributed to her problems, as she has never had this type of illness before, and she has a supportive husband and home environment. The only thing may be her willingness to take on work, forgo holidays etc, in order to help her employer.

RECOMMENDED TREATMENT

- *Rest – under normal circumstances, it takes several weeks for a person to recover from these illnesses. She will not be able to look for work, or attend interviews for this time.*
- *I have commenced her on medication, and plan to review her progress in 4 weeks.*
- *The sooner her work related issues are resolved, and the added stressors from this are eradicated, the quicker her recovery, and she can look to employment again.*

[83] It is not credible for Ora Limited to say it was not aware that Mrs Kirkley was experiencing the under pressure at this time. The sabbatical would not have been suggested but for Mr and Mrs Cullen's concerns about Mrs Kirkley's ability to cope with her new role and their cognisance of the stress she was experiencing. The email evidence alone establishes that Mrs and Mr Cullen had identified by mid to late February that Mrs Kirkley was working very hard, that she needed a break from work and an opportunity to develop.

[84] However, I cannot find that Ora Limited knew or ought reasonably to have known that Mrs Kirkley was suffering from a work-related illness or that the work-related stress she was experiencing could lead to a work-related illness.

[85] Mrs Kirkley did not notify her employer of any ill effects relating to her work. She took no sick leave during this period. She did not visit a doctor until after she had left the workplace. There is no record that she raised concerns about her workload. She cancelled three weeks of booked annual leave despite, I find, encourage from Mr Cullen not to. She took no steps to rebook that leave. She expressed, in emails, her satisfaction with her work situation, her confidence in the support of her team and in Mrs and Mr Cullen and enthusiasm for her new role.

[86] At the investigation meeting Mrs Kirkley gave oral evidence that she had applied and interviewed for a position in another business in December 2005. The position was 3 days per week and the salary \$120,000 per annum. She said that in the New Year she declined an invitation to a second interview because she decided she wanted to remain employed at Ora Limited having been offered the Head of Corporate Services role. This elucidates the second sentence in her email of 5 February 2006. Things had clearly turned a corner for Mrs Kirkley, she was excited about her future with Ora Limited. It does Mrs Kirkley no credit that this clearly relevant information was not disclosed in her written evidence or disclosed to her medical advisors.

[87] By mid-February 2006 Mrs Kirkley's relationship with Mrs Cullen was becoming strained. This culminated in the events of 20 February 2006. Mrs Cullen was justified in raising her concerns directly with Mrs Kirkley in that meeting. Mrs Kirkley was a senior manager in Mrs Cullen's business which was in crisis. Mrs Kirkley had repeatedly pledged her loyalty and support to Mrs Cullen. It was not appropriate for Mrs Kirkley to criticise Mrs Cullen's decision-making to Mr Lacey when the decision had been made and discussed.

[88] In her evidence to the Authority Mrs Kirkley listed the splitting of the human resource and administration roles as a key step she thought Ora Limited could have taken more quickly to minimise the work pressure on her. This is instructive because this was a key area of conflict between Mrs Kirkley and Mrs Cullen which Mrs

Kirkley was overruled on. Because Mrs Cullen did not agree with Mrs Kirkley on this issue did not mean she was subjecting her to unreasonable workplace stress.

[89] Notwithstanding Mrs Kirkley's non-notification of her work place stress, the evidence shows that Ora Limited recognised and took steps to minimise the workload and stress issues it identified as facing Mrs Kirkley. From mid-February 2006 a payroll clerk was engaged to take some work from Mrs Kirkley, finance and human resource reviews were commissioned and staff, including, I find, Mrs Kirkley, were referred to a union and EAP services made available. Most significantly on 21 February 2006 Mrs Kirkley was offered and accepted a six month paid sabbatical.

[90] Mrs Kirkley says the sabbatical was a pretence to remove her from the workplace. She points to her finding her belongings being boxed up on 27 February 2006 without her knowledge or consent and the ending of the employment relationship with Mr Wild and Mr De Klerk. This is not strong evidence in support of Mrs Kirkley's claim. Her situation was very different to that of Mr Wild and Mr de Klerk. There was no suggestion that Mrs Kirkley was under investigation into some allegedly improper activity or that her position was redundant. I accept the sabbatical, though sudden and unformed, was genuine.

[91] Mrs Kirkley has not made out that Ora Limited breached any duty to her and exposed her to undue work-related stress.

Issue 2: Unjustified dismissal

(i) Mrs Kirkley's dismissal

[92] On Tuesday, 28 February 2006 Mr Cullen emailed Mrs Kirkley:

Sonja

I am constructing this email as formal notification to you that as of the 28th of February, 2006 you are to regard yourself as being suspended as an employee of ora Ltd. You will continue on full pay but will need to return your vehicle, fuel card, and any other Ora Ltd property to the company office by 12 noon on the 3rd of March, 2006. Your suspension will continue until such time as we have had the opportunity to review your employment in relation to the verbally and emotionally unacceptable behaviour that was directed at various Ora staff members while your were here on the 27th of February and has been documented. All previous discussions and agreements relating to the directors of Ora Ltd allowing you a six month sabbatical to undergo training are also suspended until further notice.

You need to understand that the directors of ora consider your conduct on the 27th of February completely unacceptable in any context and we now need some time to reflect on how we must deal with this.

For reasons of company stability we would request that you suspend all activities relating to ora or Ora staff. Your server access will be removed today and your emails redirected to Brett Cullen, banking access will also be removed as of today as well as credit card authorities.

I would like to suggest that you seek advice relating to your employment agreement and we will contact you shortly to arrange a hearing to consider the following:

- 1. The companies [sic] position that you could be charged with serious misconduct in relation to your actions on 27th February, 2006.*
- 2. The consequences of this misconduct in relation to your employment as per your employment contract.*

Yours sincerely

[93] After receiving the suspension letter Mrs Kirkley visited her general practitioner.

[94] Mrs Kirkley responded to Mr Cullen's email on 2 March 2006 expressing surprise at the notice of suspension and allegation of serious misconduct, seeking immediate notice of the particulars of the alleged conduct and concern that those particulars had not been provided and advising this was causing her trauma and stress.

[95] Mr Cullen replied by email on 3 March 2006 that no further correspondence would be entered into until a meeting was arranged for the following week.

[96] Mr William Kirkley, Mrs Kirkley's husband, emailed in reply to Mr Cullen on 3 March 2006 advising the failure to provide details of the alleged misconduct was a breach of Mrs Kirkley's employment rights, that she had become seriously ill and was heavily sedated on orders from her doctor and all future correspondence should be through Mr Ponniah.

[97] Mr Cullen replied by email on 4 March 2006 expressing concern as to Mrs Kirkley's state of health, restating the issue of concern was Mrs Kirkley's conduct on 27 February 2006, providing details of Ora Limited's solicitors for future correspondence and seeking a meeting for the following week.

[98] On 7 March 2006 Mr Ponniah wrote to Mr Cullen advising his firm acted for Mrs Kirkley, he would write with more detail of her claim shortly, he understood Mrs

Kirkley had been unjustifiably suspended from her employment and that the reasons for her suspension were unclear, that Mrs Kirkley was suffering great stress and trauma as a consequence of her employment and her current treatment had amplified the effect of that stress, that requests for particulars of the allegations had been rejected, that Mrs Kirkley could be said to have been dismissed given this treatment and the return of her personal belongings by courier. Corban Revell wrote to Beattie Rickman that same day seeking full particulars of the allegations against Mrs Kirkley and an agenda for the proposed meeting.

[99] Beattie Rickman replied on 7 March 2006 attaching a letter to Mrs Kirkley detailing the allegations of serious misconduct Ora Limited wished to meet to discuss. Those allegations concerned Mrs Kirkley's conduct on 27 February 2006:

(a) An allegation that you refused and/or neglected to obey a reasonable and lawful instruction from your employer

- Specifically, that on 27 February 2006 you failed to facilitate a handover of your employment duties to enable your transition from the office to sabbatical and also failed to complete input of company financial data for February 2006.
- Your employer refers to chapter 7.2 of its Staff Handbook at page 66 – in particular, that wilful disobedience or neglect of lawful requirements or directions is an instance of serious misconduct

(b) An allegation that you failed to maintain the confidentiality of your employer's business information

- Specifically, that on 27 February 2006 you provided your employer's banking details – including site number, user name and password, together with other confidential passwords, to a temporary payroll clerk without authorisation
- Your employer refers to clause 17.3 of your Employment Agreement that provides that breaches of confidentiality will be treated as serious misconduct.

(c) An allegation that you failed to comply with the lawful and reasonable instructions issued by your employer and/or to comply with all rules and procedures established for your conduct as an employee as per clause 7.1.1 of your Employment Agreement

- Specifically, that on or around 27 February 2006, without the express authorisation or instruction from your employer, made deductions from two employees fortnightly wages or salaries by failing to pay each employee their enrolment team entitlement.
- Your employer refers to chapter 7.2 of its Staff Handbook at page 66 – in particular, that failing to follow company policy or instructions is an instance of serious misconduct.

[100] Attached to this document were statements from Mr Cullen, Gail Boshard, Ms Donaghy and Denise Rossi setting out their respective recollections of the events in

question. Also attached was an email from Vera Liu regarding the unauthorised deduction allegation.

[101] In its letter Beattie Rickman asserts there was no explicit refusal by Mr Cullen to provide information regarding the disciplinary allegations. The letter goes on to say the employer takes the allegations seriously, that the purpose of the meeting is to receive Mrs Kirkley's response to the allegations, advises that that response will be considered following the investigation meeting and that outcome may be disciplinary action up to and including dismissal.

[102] The first disciplinary meeting was held on 14 March 2006. Mr Ponniah spoke on Mrs Kirkley's behalf. A written response to the allegations was provided at the meeting to Mr Cullen and his representative. Also provided was the 7 March 2006 report from Dr Pitsilis. A copy of the report was not provided at the meeting. The meeting ended for Mr Cullen to consider Mrs Kirkley's response.

[103] On 17 March 2006 Beattie Rickman emailed Corban Revell:

As discussed in respect of the above parties, we confirm our instructions as follows:

1. *Ms Kirkley's suspension is lifted effective as from today.*
2. *Given Ms Kirkley's illness as evidence, it is considered appropriate that she take a period of sick leave. She will be paid during the sick leave period irrespective of whether there is any entitlement owing.*

[104] On 29 March 2006 Beattie Rickman emailed Corban Revell requesting a copy of Dr Pitsilis' report. The same day Mrs Kirkley emailed Ms Donaghy querying her annual and sick leave balances.

[105] On 31 March 2006 Beattie Rickman wrote to Corban Revell seeking clarification of Mrs Kirkey's health status. The letter states that the 14 March 2006 meeting was the first indication to the employer that Mrs Kirkley was ill as a result of her employment and contains a request for a medical certificate to indicate a timeframe to return to work. The request for a copy of Dr Pitsilis' report was restated. The letter also states that the investigation will continue when Mrs Kirkley is well enough to take up her sabbatical again.

[106] Beattie Rickman emailed Corban Revell on 5 April 2006 seeking a response to the correspondence of 29 and 31 March 2006. The email states Mrs Kirkley was in receipt of paid sick leave beyond her entitlement, that the medical report has not yet been provided and restates the request for the medical report.

[107] On 7 April 2006 Corban Revell replied to Beattie Rickman that Mrs Kirkley was on paid sabbatical and no sick leave entitlement was being used. The penultimate paragraph reads:

We fail to appreciate what our client is hampering. Your client has yet to advise what decision has been reached from their investigation. Please refer to our last communication.

[108] On 13 April 2006 Corban Revell wrote to Beattie Rickman:

- (i) restating Mrs Kirkley's view that she should not be on sick leave whilst on sabbatical;
- (ii) seeking post-suspension reinstatement of work-related benefits namely, use of the petrol card and electronic access to the workplace;
- (iii) querying Mrs Kirkley's annual leave calculation;
- (iv) requesting advice of the outstanding matters relating to the investigation;
- (v) requesting details of how Mrs Kirkley is allegedly hampering the investigation of the disciplinary allegations and recording that a decision in relation to the investigation had been requested and none yet received and;
- (vi) raising a personal grievance for work-related stress and resultant damage and loss and providing the background of the claim.

[109] On 17 April 2006 Mr Cullen replied to Corban Revell's letter of 13 April 2006:

- (i) rejecting, in detail, the allegations of work-related stress;
- (ii) in relation to the disciplinary investigation into the allegation of failing to maintain the employer's confidentiality Mr Cullen wrote:

I regard the provision of the banking information as a serious breach of confidentiality and completely reject the explanation given on the day of the

investigatory meeting. This has not been resolved and cannot be dismissed by claiming mental illness on the day as the cause of such a breach.

- (iii) declining the request for reinstatement of work-related benefits on the basis that Mrs Kirkley was not currently involved in any work for Ora Limited and should not therefore be using the fuel card for personal use and that she had no need to access the employer's server.
- (iv) restating the 28 February 2006 request for the vehicle to be returned.
- (v) The letter concludes:

4. Summary

The conclusions reached and accusations made in the remaining portions of the letter relating to the safety of the work environment, our perceived negligence as employers and the fact that sum of all these is the sole cause of Sonja's mental instability are completely refuted and rejected. This is simply an attempt to twist and exaggerate the events of this time for the purpose of laying a personal grievance claim which, if based on the truth of the situation, is without substance or foundation.

The reality is that Sonja does have a history of behaving in the same way as she did on the 27th of February 2006 for the purposes of getting her own way. She had been doing it for quite some time, just to select few who she could intimidate, and the events on and around the 27th of February simply brought this to the surface and to our attention. We as responsible employers recognized that we were dealing with a difficult personality and wanting the best for her, made arrangements for her to take the sabbatical to work on these issues. This was an opportunity for Sonja to take responsibility for her behaviour, instead she has blamed mental illness, working conditions, previous staff at Kiwi Ora and Susana and I all in an attempt to escape dealing with some serious personal issues.

In paragraph 45 you refer to the fact that "*your client has caused our clients breakdown and a breakdown of the trust and confidence between the employer and employee.*" Trust and confidence has, in fact, been destroyed by Sonja. Firstly, after the outburst and hysterics of February 27th we as employers could never trust that Sonja, in our absence, would not act in the same way again. We have a responsibility to other staff to protect them from that. Secondly, the untruth, misrepresentation and inaccuracy of your information supporting the personal grievance claim leads me to believe that you are quite comfortable to fabricate evidence about such important issues in an effort to aid your claim for damages. This in itself is a complete affront and seals the breakdown of any trust that may have existed.

- (vi) proposing a settlement offer of six months wages backdated to 22 February 2006.

[110] The letter was sent directly to Mrs Kirkley.

[111] On 20 April 2006 Corban Revell wrote to Mr Cullen:

- (i) asking that he refrain from sending any correspondence directly to Mrs Kirkley;

- (ii) that receiving the 17 April 2006 letter directly was upsetting to Mrs Kirkley given the content and manner of communication;
- (iii) that as a consequence Mrs Kirkley was too upset to give instructions, but a response would be provided when she was able;
- (iv) requesting copies of the motor vehicle policy;
- (v) that Mrs Kirkley is entitled to continue to use the car because it is part of her remuneration;
- (vi) that instructions regarding the settlement would be taken, but it appeared unacceptable.

[112] On 27 April 2006 Corban Revell wrote to Mr Cullen:

- (i) all relevant vehicle policy documentation had not been provided;
- (ii) that Corban Revell would advise Mrs Kirkley that she is entitled to retain the vehicle as long as she is an employee of Ora Limited;
- (iii) the settlement proposal was unacceptable;
- (iv) suggesting a face-to-face meeting next week.

[113] On 30 April 2006 the following dismissal letter was sent to Mrs Kirkley's home:

Dear Sonja

We regret to inform you that we have decided to terminate your employment with Ora Ltd as from the 1st of May 2006 on the basis of serious misconduct. Specifically, that on the 27th of February 2006 you provided Ora Ltd's banking details – including site number, user name and password, together with other confidential passwords, to a temporary payroll clerk without authorization or permission from Ora Ltd management. We refer to chapter 17.3 of your employment agreement that states that breaches of confidentiality will be treated as serious misconduct.

At the investigation meeting that was held at Ora Ltd offices on the 14th of March 2006, you provided us with explanatory notes supporting why you did this. Unfortunately, after further investigation we consider the reasons you gave to be insufficient to explain this serious breach of company confidentiality.

As such, we request the immediate return of all Ora Ltd property to Ora Ltd offices. All property that belongs to you that is still at Ora Ltd will, likewise, be returned to you as soon as possible.

Yours sincerely,

Brett Cullen, Managing Director of Ora Ltd

[114] On 4 May the following hand written note was sent to Mrs Kirkley's home address:

Dear Sonja

Here are your personal things from Ora, as promised.

I will ask you, once again, to immediately return any Ora Ltd property namely your car and mobile phone, to the Milford offices. This will be the last request that I will make before I hand this matter over to a collection agency. I will do this if these items are not returned by 4.00pm on Friday the 5th of May 2006. Thanks.

[115] On 5 May 2006 Mr Ponniah wrote to Mr Cullen raising a personal grievance on Mrs Kirkley's behalf for unjustified dismissal.

(ii) The reasons for dismissal

[116] Mrs Kirkley provided the following written explanation at the 14 March 2006 meeting in response to the allegation which formed the basis for her dismissal:

2. *An allegation that you failed to maintain the confidentiality of your employer's business information:*

As the payroll clerk was the only trained person who could fully complete the payroll so that it could be paid, I gave her my password (after considering the effects this could have – she could do nothing in the banking system, except see some balances if she chose to go there, as she had no other passwords and batches needed two password to authorise – I did this as it was important that everybody got paid) to the banking system, so that she could import the batch for completion of the payroll. I informed Jacqui that I had given her my password (as Jacqui was going to be in charge of finance and HR) and did say to Jacqui that this was not ideal and that she needed to be aware of that and do something about it. This happened while I gave Jacqui access to MYOB for her to print her report. Jacqui agreed with me this was not ideal. All along I was under the impression that everything was fine and that Brett would have it all sorted out. However, having found the payroll in disarray when my office had been packed up, I believed I was doing the right thing by ensuring that the payroll was brought back to a state where it would run on time and there would be no queries. I was never told that I had to assist in the payroll or finish it off. I had been assured by Su and Brett that it would be taken care of. I was under the impression that the payroll clerk would do all of it to the point where the payroll needed to be checked and signed off by Brett as agreed. As it turned out, I needed to go through all the things that she was required to do on this payroll to the point where she could go ahead and process it.

I seriously considered the implications of giving the payroll clerk my password and in the absence of any other authority, the limited time constraints the payroll clerk and I were under to finish it and the fact that I had acknowledged authorised for this process I firmly believed I was being helpful to the directors of this company, knowing that they were both busy with other critical matters by using my initiative in this case. Notwithstanding this I also considered the following risk factors before coming to this decision:

- a. *The payroll clerk is employed by a reputable company who not only deal with these confidential issues every day for their clients but who are also known to do extensive security checks on their personnel.*

- b. *The password would only have allowed her to see an account balance if she chose to go into those screens. No withdrawals, transfers or deposits could be done through this account in any way whatsoever without further authorisation and passwords. Nothing was revealed as long as she just imported the file.*
- c. *The password could easily be changed after she had finished.*
- d. *I informed Jacqui of what I had done, as she was going to take over my responsibilities.*
- e. *As I had complete authority to run the payroll and had done so in the past I believed I acted within the limits of my authority in this case.*

...

Conclusion:

None of this would have happened if procedures were put into place, before I left for sabbatical. I still asked at the time about handing over, but was given every assurance that matters were under control. Some sort of handing over period should have been arranged so that training could have been given to someone for the most critical procedures. Furthermore, this situation and none of these allegations would have arisen if I had chosen not to attend the meeting on that Monday morning.

To this day I still don't understand why this has all happened. Since Wayne Wilds' departure from the company I have worked long days and week-ends with all my dedication and received numerous complements and thank you emails from you that I was doing a good job. Then, all of a sudden on Monday 20 Feb everything turned around. Su shouted and screamed at me, even threatened that she would terminate my services if I did not come around to her way of thinking. Not having spent much time with her in the past and not knowing her very well, this is a hard task to fulfil. By not being told the limits of my authority and not having any guidelines to operate with it has made this even harder. On top of this I cancelled my much needed annual leave to follow through the restructure. I was running 3 jobs and had already burnt out in December, but kept going nevertheless to please you and save a company that I believe in and put my heart and soul into for the past 3.5 years.

[117] At the investigation meeting I asked Mr Cullen what further investigation he had conducted, as referred to in the dismissal letter. He said the sole further investigation he had undertaken was into whether Mrs Kirkley was “*mentally ill*” as a result of workplace stress. He said his attempts to investigate this were unsuccessful because Mrs Kirkley hampered that investigation. Mr Cullen pointed to the Beattie Rickman letters to support his evidence that he had requested further medical information. He said this inability to investigate her claims formed part of his decision that Mrs Kirkley’s stressed behaviour was part of her history of intimidating and unacceptable behaviour.

[118] When Mr Cullen was asked why the suspension had been lifted and Mrs Kirkley placed on sick leave Mr Cullen said this decision had been made on advice and out of compassion until the veracity of her claims could be tested.

[119] When it was put to Mr Cullen that he could have invoked the relevant provision of Mrs Kirkley's employment agreement (cl 7.5.2) and required her to undergo a medical assessment he agreed that was an option but gave no reason why that option was not pursued.

[120] To reach the conclusion that first Mrs Kirkley was not unwell as a consequence of work-place stress and second that her behaviour on 27 February 2006 was part of a pattern of intimidating and unacceptable behaviour and to use that conclusion as a reasonable basis for the decision to dismiss Ora Limited must show that it conducted a fair investigation.

[121] I am not satisfied that it has. These issues were not fairly put to Mrs Kirkley as aspects of the investigation into the allegations of serious misconduct. She was never told that Ora Limited was investigating whether her ill health was genuine. Her solicitor was advised by Ora Limited's solicitor's 17 March 2006 that Mrs Kirkley was to be placed on sick leave, the strong inference is that Ora Limited accepted she was unwell. Ora Limited's solicitors wrote to Mr Ponniah on 31 March 2006 advising the investigation was suspended pending Mrs Kirkley's return to sabbatical after her recovery. Further Mrs Kirkley was never advised that Mr Cullen had received information from her co-workers alleging that emotional outbursts were part of a pattern of intimidating behaviour.

[122] In his letter of 17 April 2006 Mr Cullen advises of the conclusions he has reached in relation to Mrs Kirkley's claim that she was suffering from a work-related illness. These are not tentative conclusions being put to Mrs Kirkley to comment on. They are Mr Cullen's rebuttal of the claims made in her personal grievance overlapped with his conclusion as to his disciplinary inquiry into Mrs Kirkley's conduct on 27 February 2006:

36 refers to the fact that you regard all the matters that we touched on in the investigatory meeting that we held at Kiwi ora offices on 14th of March 2006 to be dealt with. Your argument used in defending Sonja's tantrum on the 27th of February is based solely on Sonja allegedly suffering from mental illness caused entirely as a result of her work environment with no historical basis. We have six current staff members at Kiwi Ora who have given us verbal reports about Sonja behaving in a very similar fashion in the past, who were too intimidated by her to file a formal complaint, as she held the HR role and would directly or indirectly find out who made any type of complaint about her. In speaking with these people her behaviour is consistent with the behaviour exhibited on the 27th of February and they were afraid of it ever being directed at them. This paints the picture, not of a victim, but of a senior manager who is very comfortable in using threatening and intimidating behaviour to achieve

her end, which we cannot and will not tolerate. At this point I would like to make reference to paragraph 7(b) of the letter dated the 7th of March sent to you by Beattie Rickman Legal outlining the notice of investigatory meeting. It reads:

An allegation that you failed to maintain the confidentiality of your employer's business information

- *Specifically, that on 27 February 2006 you provided your employer's banking details – including site number, user name and password, together with other confidential passwords, to a temporary payroll clerk without authorization.*
- *Your employer refers to chapter 17.3 of your employment agreement that provides that breaches of confidentiality will be treated as serious misconduct.*

I regard the provision of the banking information as a serious breach of confidentiality and completely reject the explanation given on the day of the investigatory meeting. This has not been resolved and cannot be dismissed by claiming mental illness on the day as the cause of such a breach.

[123] In addition to these flaws in the investigation, Mr Cullen failed to investigate Mrs Kirkley's explanation that she had discussed giving the password to the payroll clerk with Mrs Donaghy. If he had then he would have had to consider more closely why decisive steps had not been taken on the day to remove the payroll clerk from the system. There is some force in Mrs Kirkley's argument that the password issue could not have been taken too seriously by Mrs Donaghy or Mr Cullen.

[124] Also problematic was the manner in which Mrs Kirkley was suspended and the failure to give adequate detail of the allegations when requested. The allegations should have been put to Mrs Kirkley and her comments on the reasonableness of a suspension sought before the decision was made. I accept this flaw was remedied with Beattie Rickman's involvement. However, the flavour of this process had been set.

[125] For the reasons given above, I conclude that the dismissal of Mrs Kirkley was flawed in several respects. The investigation conducted by Mr Cullen was inadequate and aspects of it were unfair. The reasoning relied on by Mr Cullen to reach his decision was wrong in principle. These were not inconsequential defects in process. They went to the heart of the decision.

[126] The decision to dismiss Mrs Kirkley was not what a fair and reasonable employer would have done in all the circumstances of this case. It follows that Mrs Kirkley's dismissal was unjustifiable.

Contribution

[127] Having found Mrs Kirkley's dismissal was unjustifiable I am required to assess the extent to which her actions contributed to the situation giving rise to her personal grievance and, if required, to reduce the remedies that would otherwise have been awarded to her³.

[128] Mrs Kirkley was dismissed because Mr Cullen did not accept her explanation for giving the viewing password to the contracted payroll clerk, he did not accept her ill health contributed to the situation and found that her conduct on the day was not a symptom of her ill health but part of a pattern of intimidating behaviour on her part.

[129] Mrs Kirkley did not deny that she gave the password to the clerk and accepted that it was not "*ideal*". Ora Limited's concerns as to the potential breach of confidentiality were reasonable.

[130] Mrs Kirkley was unwell during the unfortunate events of 27 February 2007. I find her ill health must have contributed to her conduct that day including her decision to give the payroll clerk the password.

[131] Mrs Kirkley is a very experienced and senior payroll administrator. Notwithstanding her ill health that day, that does not excuse the fundamental error she made. This error was blameworthy and contributed to the circumstances giving rise to her personal grievance. Remedies are reduced by 10%.

Remedies

[132] Mrs Kirkley was dismissed on 30 April 2006, approximately two months into her six month sabbatical which had commenced on 22 February 2006. She is entitled to the balance of that sabbatical. I set that award at four months lost wages. I accept that Mrs Kirkley was unwell during this period and that she has been unable to look for employment.

³ Section 124 Employment Relations Act 2000

[133] Mrs Kirkley's claim for lost remuneration beyond the end of the sabbatical period is declined. The causal link between Mrs Kirkley's ill health and her employment has not been made out.

[134] Mrs Kirkley claims compensation for hurt and humiliation consequent to her dismissal to the sum of \$27,000. She said she was devastated by her dismissal, that she was shocked and anxious and felt as if she had committed a terrible crime. She said she experienced sleeplessness the effect of which was compounded by her already disrupted sleep pattern. She said the pressure shifted to her husband to provide financially for the family and this reduced his ability to help with their children.

[135] Since March 2006 Mrs Kirkley has been prescribed antidepressant and anti anxiety medication. Both Dr Pitsilis and Ms Mathewson said Mrs Kirkley's dismissal was an impediment to her recovery from this illness. They both gave evidence that Mrs Kirkley had no history of depression or inability to cope with stressful situations.

[136] Ms Mathewson gave very effective evidence that Mrs Kirkley presented in a distressed state, spoke in a pressured way and was tearful. Ms Mathewson observed that Mrs Kirkley's distress at that time (July 2006) appeared to relate to a sense of having been treated unfairly, which contravened her value system and confusion because she had always held positions with a high level of trust.

[137] Mr Kirkley said the impact of Mrs Kirkley's employment situation had had a severe impact on their family. He said Mrs Kirkley continues to have difficulty sleeping, cries often and has occasions which leave her incapacitated. He said their children harbour some apprehension towards their mother.

[138] An award of this nature flows from the effects of a dismissal. There is some difficulty in cleaving the evidence in support of this claim from the evidence of the impact of work-related stress, the claim for which Mrs Kirkley has been unsuccessful.

[139] I am satisfied that the evidence of Mrs Kirkley, her husband and the medical professionals called in support distinguishes a profound reaction to her dismissal

which I accept has had a significant impact on Mrs Kirkley. I set the award at \$15,000.

Costs

[140] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then submissions should be filed and served within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority